IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-5561

WILLIAM HENRY HANCE,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The petitioner, William Henry Hance, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of Georgia without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Mr. Hance's affidavit in support of this motion is annexed.

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PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

1. Whether the introduction into evidence of two statements obtained after eighteen hours of intensive police questioning, during which petitioner's whereabouts were not revealed to his attorney, violated petitioner's rights guaranteed by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States?

2. Whether the removal for cause of three prospective jurors from petitioner's jury because of their conscientious or religious scruples against the death penalty violated petitioner's rights guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States?

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STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA

Petitioner William Henry Hance respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Georgia is reported at __Ga. __, 268 S.E. 2d 339 (Ga. 1980) and is attached hereto as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on June 24, 1980. A timely petition for rehearing was denied on July 15, 1980. On September 12, 1980, Justice Powell granted petitioner's motion to extend the time to file this petition to and including October 13, 1980. Because October 13, 1980 is an official federal holiday, the final day for filing the petition, pursuant to Rule 29.1 of the Rule of the Court is October 14, 1980. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

1. This case involves the Fifth Amendment to the Constitution of the United States, which provides in relevant part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself . . . . "

the Sixth Amendment, which provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence"

and the Fourteenth Amendment,which provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

Petitioner William Henry Hance, a career soldier stationed at Fort Benning, Georgia during his second tour of duty, was picked up by military investigators on April 4, 1978 for questioning in connection with the separate deaths of two local prostitutes, Gail Faison and Irene Thirkield, a month earlier. After eighteen hours of intensive interrogation over the course of two days, military personnel and state law enforcement officials obtained from petitioner a statement which was eventually introduced into evidence against him. A second statement was obtained after additional questioning on the following day.

Petitioner was convicted of the murder of Gail Faison and of attempted theft by extortion and was sentenced to death in the Superior Court of Muscogee County, Georgia on December 16, 1978. His conviction and sentence were affirmed by the Supreme Court of Georgia on June 24, 1980. Hance v. State, 268 S.E.2d 339 (Ga. 1980). This petition follows.

Petitioner's Arrest and Detention

At 1:00 p.m. on the afternoon of April 4, 1978 -- three weeks following Irene Thirkield's disappearance -- petitioner was ordered to report to his unit commander, where agents Richard Fox and Marvin Bessom of the Army Criminal Investigation Division ("C.I.D.") detained him for questioning. (T. 680, 737) */ Agent Fox acknowledged that at that time C.I.D. had no information connecting petitioner to the case apart from an unsubstantiated report that petitioner had been seen taking Miss Thirkield to a local bar the evening she disappeared. (T. 697-98; 727). The agents advised petitioner they intended to question him concerning the murders and transported him to Agent Fox's office at C.I.D. headquarters. (T. 680)

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*/ Each reference to the transcript of petitioner's trial in the Superior Court of Muscogee County will be indicated by the letter "T." followed by the page on which the reference may be found.

When they arrived, Agent Fox read petitioner an Army's Rights Waiver Certificate and had petitioner himself read it aloud. Petitioner testified that Agent Fox instructed him to sign the certificate if he understood his rights. (T. 930) After signing the document, petitioner testified that he requested permission to see a lawyer. Agent Fox allegedly told him that by signing the document, he had waived that right:

> "So, know [sic] I had nothing to hide, so I put my name down. So, at that time he told me something about, you're our man. You've been charged with murder or something like that. Then I told him that I'm going to call my lawyer. He said no, it's too late, you've already signed your waiver of rights. So I was stuck in a little dilemma." (T. 930; 945) */

---

*/ Both Agents Fox and Bessom testified that petitioner did not ask for a lawyer at any time during the two days of custody which preceded his statements. (T. 692; 757; 993-94) After a Jackson v. Denno hearing, the trial court found the statements to be voluntary, but added:

> I do so find that he was properly advised of his rights. I believe by his own statement he indicated that he was advised although he testified that at one point [he] wished to have an attorney. (T.743)

In possession of petitioner's signed waiver, the agents began continuous interrogation of petitioner which extended from 1:30 p.m. until after 10:20 p.m. that evening */ (T. 685; 755) At 10:20 p.m., Agents Fox and Bessom were relieved by officers of the Columbus, Georgia Police Department and of the Federal Bureau of Investigation, who continued questioning petitioner until midnight (T. 755; 930).

During the afternoon of April 4th, David Clark, an attorney who had represented petitioner in unrelated civil matters, learned from his secretary that a local newspaper article indicated that petitioner had been charged with the murders. Clark immediately began what proved to be a fruitless effort to contact petitioner.

> "[I] tried to locate him. I looked at the article to see exactly what it said, and then called the Columbus Police Department and asked them if they had Mr. Hance there, and they told me that they didn't, that they believed he was at Fort Benning. I called the County Jail and they told me they thought he was at Fort Benning. I called the stockade at Fort Benning, they said he had been sent to Columbus, they didn't have him. They suggested I call P.M.O., Provost Marshal's Office.

* * *

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*/ During this period, Agent Fox also obtained forms from petitioner consenting to a voice analysis, a handwriting analysis and a search of petitioner's room. (T. 721-23)

> I talked to the people at P.M.O. and they said they did have Hance, that he had been sent downtown. And so, I went by the Police Department to see if they in fact did have him, and I believe I saw Russell Traino over there that evening and I asked Russell if he knew anything about it, and he said, no. I stopped into the Detective Office, and they said they didn't have him. So, I checked Fort Benning and Columbus and couldn't locate him.
>
> Q No one admitted to you that they had him in their custody anywhere, is that right?
>
> A That's correct." (T. 907-08)

In all, Mr. Clark made at least seven separate inquiries, speaking with city, county and military authorities, both by telephone and in person, in an unsuccessful attempt to locate his client. Even though military officials had petitioner in their custody and under interrogation at the time of Mr. Clark's inquiries -- and though Columbus Police Department officials were able to send officers to continue the questioning of petitioner, at 10:20 p.m. on April 4th (T. 755) -- no one admitted knowledge of petitioner's whereabouts to Mr. Clark. It was not until three days later, on April 7th, that Mr. Clark first received a post card from petitioner, disclosing his location and requesting that Mr. Clark come to see him. (T. 909).

At the close of petitioner's first day of interrogation, he was placed, not in the Columbus jail or in the Fort Benning stockade but under guard in transit quarters in barracks which were normally used for temporary housing. (T. 762) According to petitioner, after approximately four hours of rest he was

roused from sleep and brought again to Agent Fox's office for further questioning by other C.I.D. agents (T. 931). Agent Fox denied knowledge of this early morning interrogation but admitted that petitioner was already in his office when he himself arrived at 7:30 a.m. on April 5th.(T. 762)

Agent Fox then recommenced questioning on April 5th at 8:00 a.m. (T. 763) and interrogated petitioner until 1:50 p.m. that afternoon, when, after sixteen hours of questioning, petitioner allegedly began for the first time to give direct evidence concerning the crimes.(T. 768) A statement in which petitioner admitted having murdered both of the women in fits of rage after they solicited him for sex, was transcribed by a stenographer, beginning at 2:30 p.m. on April 5th (T. 690; 771).*/

Petitioner remained in the custody of C.I.D. officials until the following day, April 6th, when officers of the Columbus Police Department arrived at 1:45 p.m. for further interrogation (T. 707). In the presence of Agent Fox, Detective Charles Rowe of the Columbus Police questioned petitioner for

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*/ Petitioner denied that he gave the statement voluntarily, testifying that Agent Fox threatened him with a drawn pistol until he signed the document (T. 739; 932).

two-and-one-half hours on April 6th until he obtained a second written statement (T. 712-13). Although Agent Fox admitted that he knew by the morning of April 6th that a lawyer had been attempting to contact petitioner (T. 696), Detective Rowe testified that he did not recall learning of the lawyer's efforts to reach petitioner until after he had obtained the second statement (T. 716; 729).

The Selection of Petitioner's Jury

On voir dire of prospective jurors during petitioner's trial, at least three members of the venire were challenged for cause because of their conscientious or religious scruples against the death penalty. (James Beard, T. 137-142; Florastine Crenshaw, T. 189-96; and Mary Turpin, T. 361-66; see also Mamie Rowell, T. 298-301; Diane Spivey, T. 228-30).

None of these jurors stated unmistakably that they could not judge guilt or innocence impartially or could not consider imposition of a death sentence. For example, Mary Turpin stated that she thought she could impose a sentence of death:

> "THE COURT: Well, what we want to find out is if he should be found guilty, after you've heard all the circumstances about this case, do you think that there is any way that you could vote to have him executed, that is, to find for the death penalty?
>
> [MS. TURPIN]: Well, I guess I could."
> (T. 364)

When Ms. Turpin later expressed some uncertainty, however, the trial court ordered her struck for cause:

"THE COURT: Well, that's what we need to find out whether or not you could vote for death if the circumstances of the trial, after you've learned all about it, whether or not you could, not that you would, whether you could vote to impose the death penalty?

MS. TURPIN: Well, I don't know. I just say that I don't think I could.

THE COURT: You don't think you could? I believe the juror should be excused for cause." (T. 365)

A second juror Florastine Crenshaw, indicated even more positively that she could impose a death sentence in an appropriate case:

Q You're saying that if selected as a juror in this case that there may be facts and circumstances where you personally can vote to impose, to take this man to the electric chair and have him put to death, is that right?

A Yes.

* * *

THE COURT: Well, as I understand it, you have said that there may be in certain cases facts and circumstances in which you would find that the death penalty should be imposed, that means given to someone. But, under no circumstances as far as this man is concerned, could you impose the death penalty, is that wrong?

MS. CRENSHAW: You're right.

THE COURT: I'm right?

MS. CRENSHAW: Right.

THE COURT: Well, there may be other cases in which you could vote the death penalty, you cannot vote it in this case?

MS. CRENSHAW: Right. (T. 196)

Mr. James Beard, a third prospective juror, admitted a firm, personal opposition to the death penalty but acknowledged that there were circumstances under which he would "consider a different approach to it," particularly if "the person had a prior conviction or any kind of that nature." (T. 140) */ Mr. Beard was also excused for cause.

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*/ Petitioner was alleged to have killed two women in separate incidents of criminal conduct. Petitioner also had a prior conviction.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. Petitioner objected during his trial to the admission into evidence of statements made by him to law enforcement officers (T. 743). After a suppression hearing held out of the presence of the jury, the trial court stated: "I find under the testimony given with regard to this that the best of voluntariness has been met and that the confessions will otherwise be admissible as such." Petitioner pressed the trial court, saying, "Your Honor, if I'm correct, the Court must also make the finding that [petitioner has] been advised of his rights and understood those rights," (T. 742-43). The court responded that "I do so find that he was properly advised of his rights . . . although he testified that he at one point wished to have an attorney." (T. 742-43).

During the hearing on his motion for a new trial, petitioner challenged again the trial court's decision to admit his statements into evidence, stating that "[o]ur points have to do with, first, the question of whether the accused is held incommunicado, or allowed counsel with relatives, friends or an attorney," Transcript of October 25, 1979 Hearing, at 4, and reciting in detail Mr. Clark's attempts to contact petitioner when he was in police custody. Petitioner contended that "the fact that Mr. Hance may have or may not have . . . ask [sic] for an attorney, or said he didn't want an attorney, that is negated by the fact an attorney was looking for him, trying to

find him to advise him . . . to remain silent until he could talk the case over with him," Transcript, supra at 5. The trial court overruled the motion without opinion. Id. at 20.

On appeal to the Supreme Court of Georgia, petitioner alleged as his second enumeration of error that "[t]he trial court erred when it failed to exclude the Defendant's confession in that the Defendant did not knowingly and voluntarily waive his constitutional rights." In his "Brief of Appellant," petitioner contended that Attorney David Clark "stated that he became aware of [petitioner's] arrest on the afternoon of April 4, 1978 and that he made an immediate attempt to locate the Appellant both through the Columbus Police Department and the Ft. Benning authorities, without success. (T. 907-908). Despite extensive attempts to locate the Appellant, no one would admit to having [petitioner] in custody," Brief of Appellant, 25-26. Petitioner noted that admissibility of a confession turned on "the totality of the circumstances," Brief of Appellant, at 27, among them "whether the accused is held incommunicado," id. and asserted that "the uncontradicted testimony of [attorney] Clark, in addition to that fact that Appellant was unable to freely communicate with the outside world, would support the proposition that the accused was held incommunicado," id. at 28.

The Supreme Court of Georgia rejected petitioner's claim, concluding that "[t]he trial court's determination was not clearly erroneous." Hance v. State, __Ga. __, 268 S.E.2d 339,

344 (1980). The Georgia court noted that "[a] local attorney who had represented [petitioner] in civil matters heard of his arrest and called the county jail, Columbus police headquarters and CID headquarters" but apparently discounted those facts because the attorney "testified he did not handle criminal matters, [and] was not retained but simply wanted to advise [petitioner] of his rights" id.

2. During the selection of petitioner's jury, at least four jurors were excused for cause because of their conscientious or religious scruples against the death penalty (James R. Beard, T. 137-42; Florastine Crenshaw, T. 189-97; Mamie Rowell, T. 298-301; and Mary Turpin, T. 361-66).

On appeal to the Supreme Court of Georgia, petitioner alleged as his sixth enumeration of error that he was "denied his right to a fair and impartial jury, inasmuch as a double standard was applied in the selection of the jury in regard to the potential juror proclivities with respect to the alternative verdicts of life imprisonment or death, and thus, was violative of the Sixth and Fourteenth Amendments of the United States." In his "Supplemental Brief of Appellant," petitioner contended that "any fair reading of the examination on voir dire of [these four potential jurors] . . . reveals that their opposition to the imposition of the death penalty was equivocal at best," Supplemental Brief at 9-10, and that therefore "the seclection [sic] of the jury in the case sub judice clearly violated the principle laid down in the case of Witherspoon v. State of Illinois et al.,

391 U.S. 510," Supplemental Brief at 11.

The Supreme Court of Georgia summarily rejected petitioner's claim, holding that "[t]he transcript shows that the prospective jurors' opposition to capital punishment met the Witherspoon test as reiterated in Lockett v. Ohio, 438 U.S. 586," Hance v. State, supra, 268 S.E.2d at 347.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE INTRODUCTION INTO EVIDENCE OF PETITIONER'S STATEMENTS OBTAINED AFTER EIGHTEEN HOURS OF QUESTIONING DURING WHICH TIME HIS WHEREABOUTS WERE NOT REVEALED TO HIS ATTORNEY, VIOLATED HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

The facts of this case present in bold relief an important question not addressed by this Court since Crooker v. California, 357 U.S. 433 (1958): whether the refusal by police to permit counsel access to a client undergoing custodial interrogation violates the client's Fifth or Sixth Amendment rights, rendering any statement subsequently obtained inadmissible at his trial.

In Crooker and a companion case, Cicenia v. La Gay, 357 U.S. 504 (1958), a bare five-member majority of the Court held that, under the Fourteenth Amendment, no per se rule excluding confessions obtained in such a manner could be fashioned; instead, while expressing "strong distaste" for such police

tactics, Cicenia v. La Gay, supra, 357 U.S. at 508, the Court held that the admissibility of such statements would turn on the circumstances of each case. Crooker v. California, supra, 357 U.S. at 440-41.

Since Crooker, this entire area of the law has altered significantly. Among other developments, (i) the Fifth and Sixth Amendments have been incorporated into the Due Process Clause of the Fourteenth Amendment, Malloy v. Hogan, 378 U.S. 1 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); (ii) the procedural safeguards available to suspects undergoing custodial interrogation have developed materially, see, e.g., Escobedo v. Illinois, 378 U.S. 478 (1964); Miranda v. Arizona, 384 U.S. 436 (1966); and (iii) the constitutional protection afforded the attorney-client relationship during the criminal process has expanded, see e.g., Massiah v. United States, 377 U.S. 201 (1964); Brewer v. Williams, 430 U.S. 387 (1977); United States v. Henry, __U.S.__, 65 L.Ed.2d 115 (1980). In light of these developments, the holdings in Crooker and Cicenia appear seriously undercut. The Court should grant certiorari to consider whether those cases remain controlling.

A. The Constitutional Background

In Chambers v. Florida, 309 U.S. 227 (1940), the Court identified the isolation of a defendant from his counsel, "where as prisoners they were without friends, advisors or counselors," Chambers v. Florida, supra, 309 U.S. at 238, as a seriously infirm police practice. "[T]he historical truth

[is] that the rights and liberties of people accused of crime [can] not be safely entrusted to secret inquisitorial processes." Id. at 237.

The Court's rationale for condemning the practice is plain:

> "We cannot blind ourselves to what experience unmistakably teaches: that even apart from the express threat, the basic techniques . . . secret and incommunicado interrogation -- are devices adapted and used to extort confessions from suspects."

Haynes v. Washington, 373 U.S. 503, 514 (1963). Accordingly, in numerous confession cases, the Court has singled out the denial of access by counsel to his client as a factor crucial to a finding of involuntariness. See, e.g., Spano v. New York, 360 U.S. 315, 318, 322-23 (1959); Darwin v. Connecticut, 391 U.S. 346, 347-50 (1968); */ Mincey v. Arizona, 437 U.S. 385, 396 (1978); cf. Davis v. North Carolina, 384 U.S. 737, 741, 744 (1966).

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*/ Darwin, in fact, presents a striking parallel to the facts of this case. Darwin was apparently not subjected to physical abuse or other unusual pressure. Instead, the decision in his case rested principally on the two factors: that "officers kept petitioner incommunicado for the 30 to 48 hours during which they sought and finally obtained his confession," Darwin v. Connecticut, supra, 391 U.S. at 349, and that "[d]uring the entire period petitioner was in custody, his counsel had been making determined but unsuccessful efforts to contact him," id. at 347.

B. The Sixth Amendment Right

The Court has long recognized, of course, that a criminal defendant "requires the guiding hand of counsel at every step in the proceedings against him," Powell v. Alabama, 287 U.S. 45, 69 (1932), and at least from the onset of "adversary judicial proceedings," Kirby v. Illinois, 406 U.S. 682, 688 (1972); see Hamilton v. Alabama, 368 U.S. 52 (1961); Gideon v. Wainwright, 372 U.S. 335 (1963); White v. Maryland, 373 U.S. 59 (1963); Moore v. Illinois, 434 U.S. 220 (1977), assistance of counsel is required unless waived.

Moreover, the Court has held that, after indictment, any statements deliberately elicited by law enforcement officers in the absence of counsel violates a defendant's Sixth and Fourteenth Amendment rights. Massiah v. United States, 377 U.S. 201, 206 (1964); United States v. Henry, __U.S.__, 65 L.Ed.2d 115 (1980); see also Brewer v. Williams, 430 U.S. 387 (1977)(after commencement of adversary proceedings).

Prior to the commencement of adversarial proceedings, however -- specifically in the stationhouse -- a suspect's Sixth Amendment rights have been somewhat less clearly defined. On the one hand, the Court has recognized that "'[a] person needs a lawyer right after his arrest probably more than at any other time.'" Spano v. New York, supra, 360 U.S. at 325-26 (Douglas, Black & Brennan, JJ., concurring); Escobedo v. Illinois, 378 U.S. 478, 490-92 (1964). Yet the Court has expressed reluctance to extend full Sixth Amendment protection

to suspects prior to the initiation of adversary judicial proceedings. See, e.g., Kirby v. Illinois, 406 U.S. 682 (1972). Petitioner submits that while a suspect may enjoy no Sixth Amendment right to be provided with counsel during custodial interrogation, and while police in such circumstances may have the right to question a suspect in the absence of counsel, the Sixth Amendment does require that if counsel appears at the stationhouse and requests to see his client, the police permit attorney and client to confer.

C. The Fifth Amendment Right

Whether or not Sixth Amendment rights attach at this stage, however, Miranda v. Arizona, 384 U.S. 436, 469 (1966) firmly established that "the right to have counsel present at the [police] interrogation is indispensable to the protection of the Fifth Amendment privilege against self incrimination." (emphasis added). As the Court later acknowledged:

> "The rule in Miranda . . . was based upon this Court's perception that the lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation."

Fare v. Michael C., 442 U.S. 707, 719 (1979). See, Rhode Island v. Innis, __U.S.__, 64 L.Ed.2d 297, 307 n.4 (1980).

Despite undisputed evidence that petitioner's counsel made repeated efforts to locate him after his arrest, and despite petitioner's testimony that his request to see a lawyer was met with the response that his signature on a waiver form foreclosed any further right to consult counsel,

the trial court here found that petitioner's statements had been given voluntarily and that petitioner had waived any right to consult with counsel.*/

Petitioner's claim, however, is that irrespective of any issue of voluntariness, the failure by Columbus City Police and C.I.D. agents to disclose petitioner's whereabouts upon request by his counsel suffices under the Fifth, Sixth and Fourteenth Amendments to require the suppression of his subsequent statements. It is in order to resolve this significant constitutional question that petitioner respectfully seeks certiorari from this Court.

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*/ This Court has, of course, repeatedly stressed that "'courts [should] indulge every reasonable presumption against waiver' of fundamental constitutional rights," Johnson v. Zerbst, 304 U.S. 458, 464 (1938); accord, Carnley v. Cochran, 369 U.S. 506, 514 (1962); Brookhart v. Janis, 384 U.S. 1, 4 (1966). Only last Term, the Court reasserted that strict standard of presumption against waiver of rights involving in-custody interrogation, Taque v. Louisiana, __U.S.__, 62 L.Ed.2d 622, 625 (1980) (per curiam).

II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE REMOVAL FOR CAUSE OF THREE JURORS WITH CONSCIENTIOUS OR RELIGIOUS SCRUPLES AGAINST THE DEATH PENALTY VIOLATED THE COURT'S HOLDING IN ADAMS V. TEXAS, __U.S. __, 65 L.Ed. 2d 581 (1980).

Just last Term, this Court in Adams v. Texas, __U.S. __, 65 L.Ed. 2d 581, 589 (1980) reaffirmed its consistent teaching that the Sixth and Fourteenth Amendments do not permit a state to challenge prospective jurors for cause merely because of their "views about capital punishment, unless those views would prevent or substantially impair the performance of [their] duties . . . ." Accord: Witherspoon v. Illinois, 391 U.S. 510 (1968); Boulden v. Holman, 394 U.S. 478 (1969); Maxwell v. Bishop, 398 U.S. 262 (1970); Mathis v. New Jersey, et al., 403 U.S. 946 (1971)(per curiam); Davis v. Georgia, 429 U.S. 122 (1976). The Court in Adams insisted that

> "neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or inability . . . to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty."

Adams v. Texas, supra, 65 L.Ed.2d at 593, and reiterated that only those veniremen

> "'who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.'"

Id. at 589, quoting Witherspoon v. Illinois, supra, 391 U.S.

at 522 n.21, may properly be excluded.

In the present case, Witherspoon and Adams appear to have been plainly disregarded. Indeed, the trial court permitted excusal of precisely the sorts of jurors Witherspoon and Adams were framed to protect.

For example, prospective juror Mary Turpin, who testified affirmatively that she "guess[ed] [she] could" vote to execute petitioner (T. 364), was excluded for cause after she stated in response to further questioning: "Well, I don't know. I just say that I don't think I could." (T. 365). Adams expressly cautions that a juror's "inability to deny or confirm any effects whatsoever" does not provide grounds for excusal. Adams v. Texas, supra, 65 L.Ed.2d 593. Accord: Maxwell v. Bishop, supra, 398 U.S. at 264 ("I think I do;" "Yes,I am afraid I do" held inadequate bases to exclude). Only if a juror has made it "unmistakably clear" that he or she will "automatically vote against the death penalty" may excusal be justified. No fair reading could find in Ms. Turpin's ambivalent responses for an "unmistakably clear" resolve "automatically" to vote against the death penalty.

Nor can prospective juror Florastine Crenshaw's removal be justified under Witherspoon standards. Ms. Crenshaw expressly confirmed that under some facts and circumstances she could impose a death sentence; her reservations concerned only whether she could do so in petitioner's case. Yet members of the venire "cannot be excused for cause simply because they

indicate that there are some kinds of cases in which they would refuse to recommend capital punishment." Witherspoon v. Illinois, supra, 391 U.S. at 522 n.21. Ms. Crenshaw's attitude did not disqualify her as a juror in petitioner's case.

Finally, prospective juror James Beard, although opposed on moral grounds to the death penalty, testified that he was indeed able to "consider a different approach to it," especially in cases when a defendant has committed other offenses.

By his answer, Mr. Beard exhibited no "unwillingness or an inability . . . to follow the court's instructions and obey [his] oath, regardless of [his] feelings about the death penalty." Adams v. Texas, supra, 65 L.Ed.2d at 593.

In sum, none of these jurors exhibited that fixed opposition to the death penalty which alone might have warranted their exclusion for cause. Yet each was excluded by the trial court, and the Supreme Court of Georgia on appeal held that "the prospective jurors' opposition to capital punishment met the Witherspoon test as reiterated in Lockett v. Ohio," Hance v. State, supra, 268 S.E.2d at 347. In light of the clear violations in this case, petitioner respectfully submits that either summary reversal of his death sentence, or vacation of his sentence with a remand for reconsideration in light of Adams v. Texas, supra, is warranted.

CONCLUSION

Petitioner prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

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BY: John Charles Boger

Dated: October 14, 1980
New York, New York

APPENDIX A

his petition for a writ of habeas corpus. The Supreme Court, Jordan, P. J., held that a petition which failed to allege illegal detention by any of the respondents named in the petition and failed to show service upon the director of the youth development center in which the petitioner was apparently detained was subject to dismissal without a hearing.

Affirmed.

Habeas Corpus ⇐53, 75

Habeas corpus petition failing to allege illegal detention by any of the respondents named in petition and failing to show service upon director of youth development center where petitioner was apparently detained was subject to dismissal without hearing.

Welch & Spruell, B. L. Spruell, S. L. Salo, Atlanta, for appellant.

Thomas J. Charron, Dist. Atty., for appellees.

JORDAN, Presiding Justice.

John Lincoln Marshall appeals an order dismissing his petition for habeas corpus.

Marshall, a 14 year old male, was arrested on April 22, 1980, on warrants charging him with the rape and murder of a 7 year old female. On April 25, 1980, he filed a petition for habeas corpus, alleging illegal detention by the "Juvenile Detention Home in Cobb County" because there was no probable cause for his arrest; that he had been questioned without his mother or counsel present; and that he had been denied a commitment hearing. Respondents named in the petition were the Sheriff, the District Attorney, the Cobb County Juvenile Court and Lt. Moss, the arresting officer.

The District Attorney appeared and made a motion to dismiss the petition on the ground that none of the respondents named in the petition had custody of the appellant and that the detention was by the Youth Development Center as alleged in the petition. Pursuant to this motion, the petition was dismissed on May 1, 1980, without further hearing. We granted appellant's motion to expedite.

The petition fails to allege the illegal detention by any of the respondents named in the petition and fails to show service upon the Director of the Youth Development Center where the appellant was apparently detained. The appellant's brief argues the merits of the petition but fails to address the question raised by the motion to dismiss.

A petitioner in a habeas corpus proceeding is generally entitled to a hearing on the questions raised by the petition, "yet where the petition and exhibits attached thereto disclose without contradiction that the petition is without merit, it is not error to dismiss the same without a hearing." *Bass v. Ault*, 229 Ga. 309, 191 S.E.2d 73 (1972).

Judgment affirmed.

All the Justices concur.

HANCE

v.

The STATE.

No. 36012.

Supreme Court of Georgia.

Argued March 11, 1980.

Decided June 24, 1980.

Rehearing Denied July 15, 1980.

Defendant was convicted in the Muscogee Superior Court, Followill, J., of murder and attempted theft by extortion, and was sentenced to death for the murder and five years' imprisonment for the attempted extortion. On appeal, the Supreme Court, Undercofler, C. J., held that: (1) evidence

of venue was sufficient as a matter of law; (2) defendant's statement was freely and voluntarily given and trial court did not err in failing to exclude it; (3) death penalty statute was not unconstitutionally applied; (4) defendant could not complain of charge on death penalty statute which was beneficial to him; (5) defendant's statements made during interrogation were not subject to suppression as product of illegal arrest without probable cause; (6) trial court did not err in failing to exclude venireman for cause as being predisposed to imposition of death penalty; (7) defendant's other enumerations of error were without merit; and (8) sentence of death was not imposed under influence of passion, prejudice, or other arbitrary factor.

Affirmed.

1. Criminal Law ⇐564(1)

Testimony of city engineer that location where body of murder victim was found was within the county and was not part of federal military reservation was sufficient to establish venue for murder prosecution.

2. Criminal Law ⇐527

State is under heavier burden in showing that juvenile understood and waived his rights in order for juvenile's confession to be admissible.

3. Criminal Law ⇐519(1)

Criteria set forth in case of *Riley v. State* with respect to determining voluntariness of juvenile's confession does not apply in the case of an adult's confession.

4. Criminal Law ⇐412.1(2)

Defendant's statement made to agents from military criminal investigation division, acting through defendant's commanding officer, was freely and voluntarily given and was admissible.

5. Constitutional Law ⇐270(1)
Homicide ⇐351

Provision of statute allowing for death penalty for offense of murder which was outrageously or wantonly vile, horrible, or inhuman involving aggravated battery to victim is not unconstitutionally overbroad and vague in violation of due process clause of United States Constitution and Georgia Constitution on ground that any injury grave enough to cause death is an aggravated battery within meaning of statute. U.S.C.A.Const. Amends. 5, 14; Const. Art. 1, § 1, par. 1; Code, § 27–2534.1(b)(7).

6. Criminal Law ⇐1208(1)

In order for death penalty statute to be constitutionally applied in a given case, evidence must be sufficient to satisfy first major component of statutory aggravating circumstance and at least one subpart of second component. Code, § 27–2534.1(b).

7. Homicide ⇐354

In order to impose death penalty for offense of murder which was outrageous or wantonly vile, horrible, or inhuman, not only must murder be outrageously or wantonly vile, horrible or inhuman, but in addition, facts of case must show either an aggravated battery to victim, torture of victim, or depravity of mind of defendant. Code, § 27–2534.1(b)(7).

8. Homicide ⇐354

In order to constitute aggravated battery upon victim so as to justify imposition of death penalty, bodily harm to victim must occur before death. Code, §§ 26–1305, 27–2534.1(b)(7).

9. Homicide ⇐354

Within meaning of death penalty statute, "torture" occurs when victim is subjected to serious physical abuse before death. Code, § 27–2534.1(b)(7).

See publication Words and Phrases for other judicial constructions and definitions.

10. Homicide ⇐354

Serious sexual abuse may be found to constitute serious physical abuse to murder victim and thus constitute "torture" within meaning of death penalty statute. Code, § 27–2534.1(b)(7).

11. Homicide ⇐354

"Torture" within meaning of death penalty statute may occur when murder

victim is subjected to an aggravated battery. Code, § 27–2534.1(b)(7).

12. Homicide ⇐354

Evidence of psychological abuse by defendant to victim before death where it is shown to have resulted in severe mental anguish to victim in anticipation of physical harm may amount to serious physical harm and thus "torture" of the victim, and will also support finding of depravity of mind of defendant so as to justify imposition of death penalty. Code, § 27–2534.1(b)(7).

13. Homicide ⇐354

Insofar as aggravated battery and torture are concerned, only facts occurring prior to death may be considered in determining whether imposition of death penalty is proper. Code, § 27–2534.1(b)(7).

14. Homicide ⇐354

Death of a victim who dies instantaneously with little or no forewarning does not involve "torture" or "aggravated battery" within meaning of death penalty statute; only facts showing aggravated battery or torture, which are separate from acts causing instantaneous death, will support finding of torture or aggravated battery. Code, § 27–2534.1(b)(7).

See publication Words and Phrases for other judicial constructions and definitions.

15. Homicide ⇐354

Instantaneous death of victim as a result of being killed by shotgun, although the scene of death be gruesome, does not constitute "torture," "aggravated battery" or "depravity of mind" within meaning of death penalty statute. Code, § 27–2534.1(b)(7).

See publication Words and Phrases for other judicial constructions and definitions.

16. Homicide ⇐354

Where only facts occurring prior to death are relied upon to support finding of torture or aggravated battery, fact that victim was tortured or was victim of aggravated battery will also support finding of depravity of mind of defendant within meaning of death penalty statute. Code, § 27–2534.1(b)(7).

17. Homicide ⇐354

In determining whether evidence shows "depravity of mind" within meaning of death penalty statute, age and physical characteristics of murder victim may be considered. Code, § 27–2534.1(b)(7).

18. Homicide ⇐354

A defendant who mutilates or seriously disfigures victim's body after death, or commits sex act upon victim's body after death may be found to have depraved mind and such acts would be sufficient to show depravity of mind of defendant within meaning of death penalty statute. Code, § 27–2534.1(b)(7).

19. Homicide ⇐354

Where it cannot be determined whether victim was subjected to aggravated battery or torture before death, or to mutilation or disfigurement after death, because exact time of death or precise act causing death cannot be ascertained, penalty of death nevertheless may be sustained on basis of aggravated battery or serious physical abuse before death or depravity of mind demonstrated after death. Code, § 27–2534.1(b)(7).

20. Homicide ⇐341

Defendant could not complain of trial court's failure in homicide prosecution to instruct on "depravity of mind" within meaning of death penalty statute where such instruction would have given jury an additional ground on which jury could have found aggravating circumstance and was thus beneficial to defendant. Code, § 27–2534.1(b)(7).

21. Criminal Law ⇐519(8)

Where legality of arrest was not challenged before trial court, trial court did not err in admitting defendant's confessions made subsequent to arrest.

22. Arrest ⇐63.4(6)

Probable cause existed for defendant's arrest based on information known to police that person who killed victim was a young black male soldier and that defendant, a

young black male soldier, was last person to be seen with one victim prior to death.

23. Jury ⇐108

In homicide prosecution, trial court did not use a "double standard" in failing to exclude venireman for cause as being predisposed to imposition of death penalty. Code, § 27-2534.1(b)(7).

24. Extortion and Threats ⇐32
Homicide ⇐250

Evidence authorized rational trier of fact to find each essential element of crime of murder and attempted theft by extortion beyond reasonable doubt.

25. Criminal Law ⇐1166(1)

Failure to afford defendant a preliminary hearing is not grounds for reversal of conviction.

26. Criminal Law ⇐1044.1(1)

Complaints that defendant was not afforded state-appointed expert to examine murder weapon nor given pretrial lineup were not subject to review when not raised in court below and when no request was made by oral or written motion.

27. Criminal Law ⇐371(4, 12), 372(4)

In homicide prosecution, evidence of murder of second victim was admissible to show scheme, motive, intent or design where method used to kill was identical in both crimes and both crimes were part of continuing criminal enterprise.

28. Homicide ⇐236(1)

In homicide prosecution in which evidence of murder of second victim was admitted, State was not required to tender autopsy report of second victim since medical examiner testified as to cause of death.

29. Witnesses ⇐274(2)

No error resulted from district attorney's inquiry on cross-examination about crime occurring in Virginia in order to test witness' knowledge of reputation of defendant.

30. Criminal Law ⇐1077.2(2)

Where defendant's counsel had transcript, defendant could not complain that he was not furnished an additional copy.

31. Criminal Law ⇐218(4)

Fact that deputy clerk and not magistrate had signed arrest warrants for defendant was not error.

32. Homicide ⇐354

Imposition of death penalty was justified based on evidence that defendant struck victim on head with karate chop, that defendant pulled victim from car with such force that her elbow was dislocated, and that defendant beat victim while she was still alive with tire jack with such force and savagery that when found victim's face from the top of her eyes down was completely missing, and parts of her jaw and skull were found within nine-foot radius of body. Code, § 27-2534.1(b)(7).

Richard O. Smith, William Alexander Byars, Columbus, for appellant.

William J. Smith, Dist. Atty., Arthur K. Bolton, Atty. Gen., Mary Beth Westmoreland, Staff Asst. Atty. Gen., for appellee.

UNDERCOFLER, Chief Justice.

The appellant, William Henry Hance, was convicted by a jury in the Superior Court of Muscogee County of the murder of Gail Faison and attempted theft by extortion. He was sentenced to death for the murder and five years imprisonment for the attempted extortion. This is his appeal.

Summary of Facts.

From the evidence presented at trial, the jury was authorized to find the following facts:

On or about February 28, 1978, the appellant, a soldier stationed at Fort Benning, Columbus, Georgia, went to the Sand Hill Bar located near the base for a drink. While in the bar, he was solicited by the victim, a prostitute named Gail Faison, also known as Gail Jackson or Gail Bogen. The appellant agreed to a price of $20.00 and they got into his car. He drove some 200 yards up the road to an area she selected and stopped. She began to undress when

the appellant, for no other reason than the victim was a prostitute, became enraged. He grabbed the victim and as she tried to get away, he hit her with a karate chop across her head. She fell unconscious. The appellant then pulled her out of the car, dislocating her elbow in the process. He returned to his car for a moment, but thinking she was still alive, he got a jack handle from his car, and finding his victim to be still breathing, repeatedly struck the helpless victim in the face. The beating was so severe that the victim's entire face was destroyed and bone fragments were scattered about the area. Some of the victim's brain tissue was literally beaten from the skull. The force of the appellant's attack was so great it produced a depression in the ground behind the victim's head. The appellant then buried the victim's body in a shallow grave he dug with an entrenching tool.

During this period of time, the City of Columbus was being terrorized by a series of unsolved strangulation murders. Beginning on March 3, 1978, the appellant, in order to avert suspicion from himself, sent a total of five letters to the Chief of Police of Columbus, Georgia, and one letter to the local newspaper. These letters were written on Army stationery and demanded that either the Columbus strangler be caught by a certain date or a female named Gail Jackson would be executed. The letters were signed "Forces of Evil," a fictitious group the appellant had created. The second of these letters received by the Chief of Police demanded either the apprehension of the Columbus strangler or a $10,000 ransom in return for the victim's safety. In addition, the appellant found an Army cap with a different unit insignia than his unit and placed this near the crime scene, also in order to avert suspicion.

On March 15, 1978, the appellant went to Vice Mitchell's Bar. While there, Irene Thirkield asked him to give her a ride to the Sand Hill bar. While in appellant's car she solicited him. After she had removed her clothes, appellant again became enraged and attacked her in the same manner as he had attacked the first victim. He beat Irene Thirkield so severely that her entire head was missing from her body. Appellant hid her body on the military reservation behind a pile of logs.

On March 30, 1978, the appellant called the military police and told them exactly where to find Gail Faison's body. The body was recovered that afternoon.

Appellant thereafter added the name "Irene" to the letters he was sending to the police chief and stated that she, like his first victim, would die unless the terms were met. In the fourth letter received by the Columbus police, the appellant detailed the exact manner of the killing of Gail Faison, including the dislocated elbow.

Again, in a similar manner to the calls made regarding his first victim, the appellant called the military police.

The military police, acting upon information that the appellant was the last person seen with Irene Thirkield, questioned the appellant and obtained a confession as to both murders. Subsequently, the appellant also gave a confession to Columbus authorities. He told authorities where he had disposed of the murder weapons and clothes of the victims. These were subsequently recovered. Handwriting samples were obtained from the appellant and were matched with handwriting on the letters received by the chief of police. A fingerprint from one of the letters was determined to be that of the appellant.

Enumerations of Error.

1. Appellant contends in his first enumeration of error that the State failed to prove venue sufficiently as a matter of law.

[1] The State presented evidence that the body of the victim was found within Muscogee County in close proximity to the Fort Benning military reservation. Agent William Wanninger testified that he pointed out the location of the body to the City Engineer of Columbus, Georgia, James D. Webb. The city engineer testified that the location shown to him was situated within the county and was not part of the Federal

military reservation. No conflicting evidence was introduced. *Climer v. State*, 204 Ga. 776, 51 S.E.2d 802 (1949). This evidence was sufficient to establish venue in Muscogee County. *Wimbish v. State*, 70 Ga. 718(3) (1883); *Ellard v. State*, 233 Ga. 640, 212 S.E.2d 816 (1975); *Aldridge v. State*, 236 Ga. 773, 225 S.E.2d 421 (1976).

[2, 3] 2. In his second enumeration of error, appellant asserts that the trial court erred in failing to suppress his confessions because they were not freely and voluntarily given. Appellant urges that the criteria enumerated in the case of *Riley v. State*, 237 Ga. 124, 226 S.E.2d 922 (1976), should be used in determining the voluntariness of the confession. *Riley*, however, involved the confession of a juvenile. The State is under a heavier burden in showing that a juvenile understood and waived his rights. See *Massey v. State*, 243 Ga. 228, 253 S.E.2d 196 (1979). Therefore, the criteria set forth in that case does not apply in the case of an adult's confession.

The appellant was given a *Jackson v. Denno* hearing and the trial court determined that the confession was freely and voluntarily given. The trial court's determination was not clearly erroneous. Under these circumstances the determination in favor of admissibility is accepted by the appellate court. *Johnson v. State*, 233 Ga. 58, 209 S.E.2d 629 (1974); *Amadeo v. State*, 243 Ga. 627, 255 S.E.2d 718 (1979); *Burney v. State*, 244 Ga. 33, 257 S.E.2d 543 (1979); *McClesky v. State*, 245 Ga. 108, 263 S.E.2d 146 (1980). In this case the evidence shows that agents from the military criminal investigation division stationed at Fort Benning, acting through appellant's commanding officer, requested that appellant accompany them to CID headquarters for the purpose of being interviewed. Appellant readily agreed. The interview began at approximately 12:45 p. m. and lasted until 10:20 p. m. Appellant was advised of his rights under the Fifth and Sixth Amendments. He signed a waiver and was informed that the interview pertained to the murder of Irene Thirkield. Appellant made incriminating statements that afternoon in which he admitted writing the letters signed "Forces of Evil," but was compelled to do so by that "organization." The appellant was then interviewed by local authorities and the F.B.I. He was housed overnight in the Bachelor Enlisted Quarters under guard. The next morning at approximately 7:30 a. m. he was again advised of his rights and he signed a written waiver. The interview terminated at 3:00 p. m. after a written confession was obtained. The appellant was interviewed for a total time of 18 hours. During this period, however, he was fed lunch and dinner, allowed to use the restroom, smoke and eat snacks. The questioning was not continuous but was spread over a two-day period. At no time did the appellant request an attorney or ask that the interview be terminated. A local attorney who had represented the appellant in civil matters heard of his arrest and called the county jail, Columbus police headquarters and CID headquarters at Fort Benning. He testified he did not handle criminal matters, was not retained but simply wanted to advise the appellant of his rights. The attorney was not able to locate the appellant.

The agents questioning the appellant testified they did not know that an attorney was attempting to find the appellant, but when they learned this fact they immediately told the appellant, who had already confessed, and he refused to see him.

No threats nor promises were made to the appellant during the interrogation.

[4] Under these circumstances, appellant's statement was freely and voluntarily given and the trial court did not err in failing to exclude it.

[5] 3. In his fourth enumeration of error, appellant attacks the constitutionality of Code Ann. § 27-2534.1(b)(7). He argues that any injury grave enough to cause death is an aggravated battery within the statute and therefore the statute is overbroad and vague in violation of the due process clause of the United States Constitution and the Constitution of the State of Georgia. However, the Supreme Court of

the United States has upheld the constitutionality of the statute when attacked on these same grounds. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). This court has held that this code section will not be permitted to become a "catchall" and upon sentence review will restrict affirmance to those cases which lie at the very core of the code section. *Harris v. State*, 237 Ga. 718, 230 S.E.2d 1 (1976). See *Patrick v. State*, 245 Ga. 417, 265 S.E.2d 553 (1980).

Recently the United States Supreme Court has considered this section as applied to a specific factual situation. *Godfrey v. Georgia*, — U.S. —, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). In *Godfrey v. Georgia*, it was held that Code Ann. § 27–2534.1(b)(7), although constitutional, was unconstitutionally applied under the specific facts of that case. In order for Code Ann. § 27–2534.1(b) to be constitutionally applied in a given case, we hold that the evidence presented at trial must satisfy the following criteria as they apply to the specific factual situation of each case.

Code Ann. § 27–2534.1(b)(7) provides in pertinent part: "The offense of murder . . . was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim."

[6] This statutory aggravating circumstance consists of two major components, the second of which has three sub-parts, as follows: (I) The offense of murder was outrageously or wantonly vile, horrible or inhuman (II) in that it involved (A) aggravated battery to the victim, (B) torture to the victim, or (C) depravity of mind of the defendant. In determining "[w]hether . . . the evidence supports the jury's or judge's finding of [this] statutory aggravating circumstance . . . ." (Code Ann. § 27–2537(c)(2)), the evidence must be sufficient to satisfy the first major component of the statutory aggravating circumstance and at least one sub-part of the second component, as hereinafter set forth. See *Fair v. State*, 245 Ga. —, — S.E.2d — (1980), post.

The phrases "outrageously or wantonly vile, horrible or inhuman" are words of common understanding, have essentially the same meaning, and are included in the statute to distinguish ordinary murders for which the penalty of death is not appropriate, from those murders for which the death penalty may be imposed. *Godfrey v. Georgia*, supra.

[7] Under the plain meaning of the statute, not only must the murder be outrageously or wantonly vile, horrible or inhuman, but in addition, the facts of the case must show either an aggravated battery to the victim, torture of the victim, or depravity of mind of the defendant as hereinafter explained.

[8] An aggravated battery occurs when "[a] person . . . maliciously causes bodily harm to another by depriving him of a member of his body, or by rendering a member of his body useless; or by seriously disfiguring his body or a member thereof." Code Ann. § 26–1305. In order to constitute aggravated battery, the bodily harm to the victim must occur before death. *Godfrey v. Georgia*, supra.

[9–11] Torture occurs when the victim is subjected to serious physical abuse before death. *Godfrey v. Georgia*, — U.S. p. —, 100 S.Ct. p. 1766. Serious sexual abuse may be found to constitute serious physical abuse. *House v. State*, 232 Ga. 140, 205 S.E.2d 217 (1974). Torture also occurs when the victim is subjected to an aggravated battery as hereinabove defined.

[12] Evidence of psychological abuse by the defendant to the victim before death where it is shown to have resulted in severe mental anguish to the victim in anticipation of physical harm may amount to serious physical abuse (i. e., torture of the victim), and also will support a finding of depravity of mind of the defendant.

[13–15] Insofar as aggravated battery and torture are concerned, only facts occurring prior to death may be considered. The death of a victim who dies instantaneously with little or no forewarning does not in-

volve torture or aggravated battery (*Godfrey v. Georgia*, — U.S. —, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980)); *Mulligan v. State*, 245 Ga. 266, 264 S.E.2d 204 (1980); i. e., only facts showing aggravated battery or torture (as hereinabove defined), which are separate from the act causing instantaneous death, will support a finding of torture or aggravated battery. The instantaneous death of a victim as a result of being killed by a shotgun, although the scene of death be gruesome (no other facts appearing), does not constitute torture, aggravated battery or depravity of mind. (*Godfrey v. Georgia*, supra.)

[16] Where only facts occurring prior to death are relied upon to support a finding of torture or aggravated battery, the fact that the victim was tortured or was the victim of an aggravated battery will also support a finding of depravity of mind of the defendant; i. e., a defendant who tortures the victim or subjects the victim to an aggravated battery before killing the victim can be found to have a depraved mind.

[17] In determining whether the evidence shows "depravity of mind," the age, and the physical characteristics of the victim may be considered. See *Thomas v. State*, 245 Ga. 688, 266 S.E.2d 499 (1980).

[18] A defendant who mutilates or seriously disfigures the victim's body after death (cf. Code § 26–1305, supra), or who commits a sex act upon the victim's body after death may be found to have a depraved mind and such acts would be sufficient to show depravity of mind of the defendant within the meaning of the statute.

[19] Where it cannot be determined whether the victim was subjected to an aggravated battery or torture before death, or to mutilation or disfigurement after death, because the exact time of death or the precise act causing death cannot be ascertained, the penalty of death nevertheless may be sustained on the basis of aggravated battery or serious physical abuse before death or depravity of mind demonstrated after death.

As heretofore stated, the evidence must be sufficient to satisfy the first major component of statutory aggravating circumstance seven (7) ("outrageously or wantonly vile, horrible or inhuman"), and at least one (or more) of the three parts of the second component (aggravated battery to the victim, or torture to the victim, or depravity of mind of the defendant).[1]

Review of the actual application of the section to the evidence in the case is a matter of sentence review and will be considered in that division of this opinion.

4. The trial court in the sentencing phase instructed the jury that they were authorized to consider the death penalty if they found the following statutory aggravating circumstance beyond a reasonable doubt: "The offense of murder . . . was outrageously or wantonly vile, horrible, or inhuman in that it involved . . . an aggravated battery to the victim." Code Ann. § 27–2534.1(b)(7).

Appellant in his third enumeration of error argues that under Code Ann. § 27–2534.2(b)(7), a jury is not authorized to impose a death penalty unless they find not only an "aggravated battery," but also "depravity of mind." This enumeration is without merit.

[20] To have charged "depravity of mind" would have given the jury an additional ground in which the jury could have found the existence of the statutory aggravating circumstance and therefore would have been detrimental to the appellant. See Division 3. Appellant cannot complain of a charge which is beneficial to him.

[21] 5. Appellant's fifth enumeration of error contends that his statements made during his interrogation should have been excluded because these statements were the product of an illegal arrest without probable cause. Appellant argues that an arrest is a seizure within the meaning of the Fourth Amendment and therefore an arrest

1. Justice Harold Hill is the author of Division 3 of this opinion.

absent probable cause violates the amendment, thereby triggering the exclusionary rule. *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979). However, appellant never challenged the legality of his arrest and raises this argument for the first time on appeal. *Fleming v. State*, 243 Ga. 120, 252 S.E.2d 609 (1979); *Mallory v. State*, 230 Ga. 657, 198 S.E.2d 677 (1973); *Jackson v. State*, 229 Ga. 191, 190 S.E.2d 530 (1972). The legality of the arrest not being challenged below, the trial court did not err in admitting defendant's confessions.

[22] Notwithstanding appellant's failure to object below, we find that upon careful examination of the record, probable cause for the appellant's arrest existed.

Agents of the military police were in possession of the following information prior to appellant's arrest. First, from the phone calls they knew the person who killed the victims was a young black male. Second, they knew that the perpetrator was a soldier because the calls they received showed an intimate knowledge of the military reservation and the letters were written on military stationery. Also, a military cap was found near one of the bodies. Finally, they knew that the appellant, a young black male soldier, was the last person seen with a victim prior to her death. Such information would lead a reasonably cautious person to believe that appellant had committed the offense, thereby furnishing probable cause for his arrest. See *Draper v. United States*, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1958); *Beck v. Ohio*, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964); *Strauss v. Stynchcombe*, 224 Ga. 859, 165 S.E.2d 302 (1968); *Peters v. State*, 114 Ga.App. 595, 152 S.E.2d 647 (1966).

[23] 6. In his sixth enumeration of error, appellant contends not only that the rule of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1967), was violated with respect to four veniremen, but also that the trial court used a "double standard" when it failed to exclude a venireman for cause as being predisposed to the imposition of the death penalty. We do not agree. The transcript shows that the prospective jurors' opposition to capital punishment met the *Witherspoon* test as reiterated in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2594, 57 L.Ed.2d 973 (1978); *Harris v. Hopper*, 243 Ga. 244, 253 S.E.2d 707 (1979).

One potential juror, upon voir dire examination, favored the imposition of the death penalty. However, it is clear from the transcript that this potential juror would consider both punishments authorized by law in her deliberations. She was not "irrevocably committed" to the sentence of death no matter what the facts and circumstances of the case. It therefore follows that the court's failure to excuse the juror upon motion was not based upon a "double standard." *Patrick v. State*, supra.

7. The appellant was represented prior to trial by court-appointed counsel. Appellant moved that he be allowed to represent himself at trial, which motion was granted. However, court-appointed counsel assisted the appellant throughout the trial. Counsel examined potential jurors, cross examined witnesses and made timely objections. Prior to trial appointed counsel had filed pretrial motions. On appeal, appellant is represented by two appointed attorneys. Appellant, however, has filed in letter form a list of errors which he requests we address. While such a procedure is improper, we will nevertheless address the issues presented.

[24] The evidence viewed in a light most favorable to the verdict would authorize a rational trier of fact to find each essential element of the crimes of murder and attempted theft by extortion beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

[25] The failure to afford the appellant a preliminary hearing is not grounds for reversal. *State v. Middlebrooks*, 236 Ga. 52, 222 S.E.2d 343 (1976).

[26] The appellant complains that he was not afforded a State-appointed expert to examine the murder weapon nor given a

pretrial lineup. However, these issues were not raised below and no request was made by oral or written motion. See *Fleming v. State*, supra.

[27] The State introduced over objection evidence of the murder of the second victim to show scheme, motive, intent or design. The method used was identical in both crimes, and both crimes were a part of a continuing criminal enterprise. The evidence was properly admitted. *McClesky v. State*, supra.

[28] The State was not required to tender an autopsy report of the second victim as the medical examiner testified as to the cause of death.

[29] During the cross examination of appellant's character witness, the district attorney inquired about a crime occurring in Virginia in order to test the witness's knowledge of the reputation of the defendant. Neither appellant nor his counsel objected and in fact appellant argued a reference to this crime to the jury in closing. This argument is without merit. *Moulder v. State*, 9 Ga.App. 438, 71 S.E. 682 (1911); *Jackson v. State*, supra; *Fleming v. State*, supra.

[30] It is apparent from the brief filed that appellant's counsel had a transcript and the appellant cannot complain he was not furnished an additional copy. See *Mydell v. Clerk, Superior Court of Chatham County*, 241 Ga. 24, 243 S.E.2d 72 (1978).

[31] Finally, appellant has called attention to the fact that a deputy clerk and not a magistrate had signed his arrest warrants. This argument is without merit. *Shadwick v. City of Tampa*, 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed.2d 783 (1972); *Johnson v. State*, 111 Ga.App. 298, 141 S.E.2d 574 (1965).

Sentence Review.

[32] As required by Ga.L.1973, p. 159 et seq., Code Ann. § 27-2537(c)(1-3), we have reviewed the death sentence in this case. We have considered the aggravating circumstances found by the jury, the evidence concerning the crime and the defendant pursuant to the mandate of the statute. We conclude that the sentence of death imposed in this case was not imposed under the influence of passion, prejudice, or any other arbitrary factor.

The jury found the following aggravating circumstances: "The murder was outrageously or wantonly vile, horrible, or inhuman in that it involved an aggravated battery to the victim." Code Ann. § 27-2534.1(b)(7).

Under the evidence of this case, the victim was struck on the head with a karate chop and fell over bleeding. She was pulled from the car with such force that her elbow was dislocated. All of these injuries occurred prior to death. The victim, again while still alive, was beaten with a tire jack with such force and savagery that when found her face from the top of the eyes down was completely missing, and parts of her jaw and skull were found within a nine foot radius of the body. The cause of death was *multiple* compound fractures of the skull and face, and evulsion (removal) of the victim's brain. Although it is unknown at what exact time during the beating the victim died, the jury was authorized to find from the evidence, an aggravated battery prior to death in that the victim's elbow and face were at a minimum rendered useless. Code Ann. § 26-1305. *See Baker v. State*, 245 Ga. 657, 266 S.E.2d 477 (1980).

The murder was outrageously or wantonly vile, horrible or inhuman in that this murder is distinguishable from ordinary murders in which the death penalty is not appropriate. The victim was not killed instantaneously, she was not a member of the victim's family, nor was she subjecting him to any emotional trauma. She gave the victim no reason whatsoever to assault her, and was in no manner threatening. The appellant showed no remorse for the killings and attempted in every manner to hide his crime. Under the evidence of this case, it cannot be argued that the nature of the injuries to the victim was not of the type universally condemned as outrageously or wantonly vile or inhuman. See *Patrick v. State*, supra.

Under the evidence of this case, the aggravated battery was of such a nature as to go to the very core of Code Ann. § 27-2534.1(b)(7), and the section is constitutionally applied under the evidence in this case. *Godfrey v. Georgia*, supra, Division 3.

We find that the evidence factually substantiates and supports the finding of this aggravating circumstance and the sentence of death by a rational trier of fact beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). We have thoroughly reviewed the instruction of the trial court during the sentencing phase of the trial and find that the charge was not subject to the defects dealt with in *Fleming v. State*, 240 Ga. 142, 240 S.E.2d 37 (1978), and *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833 (1978). In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed. We find that the following similar cases listed in the appendix support affirmance of the death penalty. Appellant's sentence to death for murder is not excessive or disproportionate to the penalty imposed in similar cases considering the crime and the defendant.

Judgment affirmed.

All the Justices concur.

APPENDIX.

Jackson v. State, 229 Ga. 191, 190 S.E.2d 530 (1972); *Owens v. State*, 233 Ga. 869, 214 S.E.2d 173 (1975); *Chenault v. State*, 234 Ga. 216, 215 S.E.2d 223 (1975); *Harris v. State*, 237 Ga. 718, 230 S.E.2d 1 (1976); *Young v. State*, 239 Ga. 53, 236 S.E.2d 1 (1977); *Potts v. State*, 241 Ga. 67, 243 S.E.2d 510 (1978); *Patrick v. State*, 245 Ga. 417, 265 S.E.2d 553 (1980).

DAMPIER
v.
The STATE.
No. 35378.

Supreme Court of Georgia.

June 24, 1980.

The Supreme Court, 245 Ga. 426, 265 S.E.2d 565, affirmed the imposition of the death penalty following defendant's conviction for murder. Subsequently, the Supreme Court of the United States rendered opinion in *Godfrey v. Georgia* involving death penalty statute. In supplementary opinion, the Supreme Court, held that murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to victim" so as to justify imposition of death penalty where defendant planned to kill victim in advance as part of armed robbery and victim was forced at gunpoint to drive his own vehicle to chosen execution site where victim knelt and begged for his life for a full five minutes while facing a large-bore shotgun pointed at his face.

Affirmed.

1. Homicide ⇐354

While death of victim who dies instantaneously with little or no forewarning does not involve torture or aggravated battery, evidence of psychological abuse by defendant to victim prior to death, where it is shown to have resulted in severe mental anguish to victim in anticipation of physical harm, may amount to "torture" of the victim so as to justify imposition of death penalty. Code, § 27-2534.1(b)(2, 7).

See publication Words and Phrases for other judicial constructions and definitions.

2. Homicide ⇐354

Murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to victim" so as to justify imposi-

tion of death penalty where defendant planned to kill victim in advance as part of armed robbery and victim was forced at gunpoint to drive his own vehicle to chosen execution site where victim knelt and begged for his life for a full five minutes while facing a large-bore shotgun pointed at his face. Code, § 27–2534.1(b)(2, 7).

See publication Words and Phrases for other judicial constructions and definitions.

Addendum to 245 Ga. 427, 265 S.E.2d 565.

Subsequent to our decision in this case, but prior to transmittal of the remittitur to the trial court, the Supreme Court of the United States has decided *Godfrey v. Georgia*, —— U.S. ——, 100 S.Ct. 1759, 64 L.Ed.2d 398 (May 19, 1980). In that the appellant's sentence of death rests partially[1] upon Code § 27–2534.1(b)(7), his sentence must be reviewed in light of *Godfrey*.

Code Ann. § 27–2534.1(b)(7) provides in pertinent part: "The offense of murder . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." In *Godfrey*, the court found that § (b)(7) was unconstitutionally applied *in that* case. We find material differences between *Godfrey* and the case under review, which distinguish this murder from the murder in *Godfrey* and from other "ordinary" murders for which the death penalty is not appropriate.

In our opinion in this case, we held that the jury's finding beyond a reasonable doubt that the "murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to the victim," was supported by the evidence. The evidence in this case clearly establishes that the appellant planned to kill his victim in advance as part of an armed robbery, the sole purpose of which was to obtain funds to buy drugs. The victim was forced at gunpoint to drive his own vehicle to the chosen execution site. Once at the area, the victim dropped to his knees, wrapping his hands around his head; he begged for his life for a full five minutes; during this time, he was listening to the co-defendant encourage the appellant to kill him. The victim was also facing a large-bore shotgun pointed at his face.

[1] While the death of a victim who dies instantaneously with little or no forewarning does not involve torture or aggravated battery, evidence of psychological abuse by the defendant to the victim prior to death, where it is shown to have resulted in severe mental anguish to the victim in anticipation of physical harm, may amount to serious physical abuse (i. e., torture of the victim), and will support a finding of depravity of mind of the defendant. Furthermore, while the death itself was relatively instantaneous, the victim was not a member of the appellant's family, nor was the victim threatening or causing any emotional trauma to the appellant. The murder was a cold-blooded, execution-style killing, perpetrated for no other reason than to eliminate a witness to an armed robbery. The appellant did not acknowledge his responsibility for his crimes, but fled the state and had to be captured at gunpoint. Cf., *Godfrey v. Georgia*, supra.

[2] Under the facts of this case, we find that the murder was a type universally condemned by civilized society as wantonly vile, horrible or inhuman, as it involved depravity of mind of the defendant and torture to the victim, as set forth above. See generally, *Hance v. State*, 245 Ga. 856, 268 S.E.2d 339 (1980).

Judgment of affirmance of the death penalty adhered to.

All the Justices concur.

1. The jury returned a finding of two statutory aggravating circumstances, Code Ann. §§ 27–2534.1(b)(2) and 27–2534.1(b)(7). In *Godfrey*, the court was concerned with a sentence of death resting exclusively on § 27–2534.1(b)(7). *Godfrey v. Georgia*, —— U.S. ——, n. 15, 100 S.Ct. 1759, n. 15, 64 L.Ed.2d 398. The other statutory aggravating circumstances are more specific and measurable. *Godfrey v. Georgia*, —— U.S. ——, ——, n. 2, 100 S.Ct. 1759, 1762, n. 2, 64 L.Ed.2d 398. Therefore, under our decisions, the death penalty, infra, may be upheld upon § 27–2534.1(b)(2). *Gates v. State*, 244 Ga. 587, 261 S.E.2d 349 (1979); *Burger v. State*, 245 Ga. 458, 245 S.E.2d 796 (1980).